Supreme Court, U.S.
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No. 04- 04 289

IN THE

Supreme Court of the United States

DR. LIONNEL LUGO RODRIGUEZ, *et al.*,

Petitioners,

v.

PUERTO RICO INSTITUTE OF CULTURE, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

POINT I. WHETHER THE COURT ERRED WHEN IT ALLOWED THE RES JUDICATA DEFENSE.

POINT II. WHETHER THE COURT ERRED WHEN IT FOUND THAT APPELLANT/PLAINTIFF FAILED TO FILE CONTESTED FACTS IN OPPOSITION TO SUMMARY JUDGMENT AND DID NOT COMPLY WITH LOCAL RULE 311.

POINT III. WHETHER THE APPEAL COURT ERRED WHEN THE DISTRICT COURT ERRED WHEN THE COURT SUA SPONTE MOVED TO DISMISS THE COMPLAINT FOR FAILURE TO STATE A CAUSE OF ACTION SHOULD OF AFFORDED APPELLANT/ PLAINTIFF AN OPPORTUNITY TO AMEND THEIR PLEADINGS IN THE RICO AND SECTION 1983.

LIST OF PARTIES

Petitioners are Dr. Lionnel Lugo Rodriguez, ARPO, S.E., d/b/a Plaza Suroestç Mall, Plaza Oasis, & Hotel Oasis, Inc.

Respondents are Puerto Rico Institute Of Culture; Robert L. Bonds-Davila; Jorge Ortiz-Colon; Doris Masa; Hector Cazul; Mildred Gonzalez-Valentin; Crim;, a/k/a Collection Center for Municipal Income; Ramon Nazario; Carlos Martinez; Manuel Velazquez-Aviles; Federal Insurance Company.

STATEMENT PURSUANT TO RULE 29.6

Petitioners, ARPO, S.E., d/b/a Plaza Suroestç Mall, and Plaza Oasis, & Hotel Oasis, Inc., have no parent corporations and no publicly held company owns 10% or more of either company's stock.

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Appendix B – Opinion And Order Of The United States District Court For The District Of Puerto Rico Filed August 13, 2002 ..... 10a

Appendix C – Order Of The United States Court Of Appeals For The First Circuit Denying Petition For Rehearing Dated June 1, 2004 ..... 29a

Petitioners respectfully prays that a writ of certiorari issue to review the order below.

OPINIONS BELOW

The Opinion of the First Circuit Court of Appeals decided on May 5, 2004 affirming the judgment of dismissal is reported at (*Dr. Lugo Rodriguez v. P.R Institute of Culture*, __ F.3d (1st Cir. 2004) (App. A, *infra*, 1a-9a).

The U.S. District Court for the District of Puerto Rico, issued a nonpublished opinion filed on August 13, 2002 (App. B, *infra*, 10a- 28a).

The Order First Circuit Court of Appeals denying the Petition for Rehearing en banc was entered on June 1, 2004 (App. C, *infra*, 29a).

STATEMENT OF JURISDICTION

Jurisdiction of the United States District Court for the District of Puerto Rico was based on 28 U.S.C. §§ 1331-1343. Jurisdiction of the First Circuit Court of Appeals was based on 28 U.S.C. § 1291. The United States Supreme Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. Constitutional

There is no contention that the United States District Court for the District off Puerto Rico must give full faith and credit to the judgments of the courts of the Commonwealth of Puerto Rico. 28 U.S.C. § 1738 (1982). Section 1738 requires the federal courts to give the same preclusive effect to state court judgments that these judgments would be given in the courts of the State from which the judgments emerged. *Kremer v. Chemical Construction Corp.*, 456 U.S. 466 (1982).

Petitioner's 42 U.S.C. § 1983, 1986 Civil Rights Act and Civil Rico claims are both applicable to 28 U.S.C. § 1738 application.

B. Statutory Puerto Rico Law On Res Judicata General Rule

The reviewing appellate court needed to look to the Puerto Rico Law to determine if the District Court committed error when it held that the prior state case constituted res judicata. *Rodriguez v. Baldrich*, 628 F.2d 691, 693 (1st Cir. 1980).

The pertinent Puerto Rico statute is Article 1204 of the Civil Code, 31 L.P.R.A. section 3343 that requires "the most perfect identity between the things, causes and persons of the litigants, and their capacity as such" *See Pagan Hernandez v. Universidad de Puerto Rico*, 107 P.R.R. 795, 806; 107 D.P.R. 720, 731-732 (1978); *Bolker v. Superior Court Sosa. Int.*, 82 P.R.R. 785, 792 (1961); *Futura Dev. Corp. v. Centrex Corp.*, 761 F.2d 33, 42-45 (1st Cir. 1985).

Res judicata is a judge-made doctrine based upon policy considerations, and it is appropriate to take into account equitable concerns. *Diversified Foods Inc., v. First Nat'l Bank of Boston*, 985 F.2d 27, 31 (1st Cir. 1993). The First Circuit Court of Appeals has recognized and held that under Puerto Rico law, "res judicata should not be applied inflexibly if doing so would run counter to the ends of justice when public policy concerns are present". *Baez Cruz v. Municipality of Comerio*, 140 F.3d 24, 28 (1st Cir. 1998).

Among these exceptions are those cases which are permeated by consideration of public policy, which include a previous judgment (which was null) based upon an acceptance of a claim which was null, *Vidal v. Mongas*, 66 P.R.R. 588, 599 (1946); a previous judgment entered without jurisdiction, *Tartak v. District Court and Cruz, Int.*, 74 P.R.R. 805, 812 (1953); a Superior Court judgment whose review was sought but not attained because of reasons not within the applicant's powers, *Riera v. Piza*, 85 P.R.R. 256, 267 *et seq.* (1962); the ends of justice were defeated *Feliciano Ruiz v. Alfonso Develop. Corp.*, 96 P.R.R. 105, 110 (1968).

C. Fraud As An Exception

The other exception to the res judicata rule, as in the case at bar, is where there is fraud, *Suarez Feliciano v. Superior Court*, 88 P.R.R. 133, 148 (1963).

STATEMENT OF THE CASE

On October 2, 2001, appellant/plaintiffs Dr. Lionel Lugo Rodriguez, ARPO, S.E., d/b/a Plaza Suroeste Mall, Plaza Oasis, & Hotel Oasis, Inc.,, filed a civil rights verified complaint seeking declaratory and injunctive relief and compensatory and punitive damages pursuant to Title 42, United States Code, Section 1983, 1986 & 1988, 18 U.S.C. section 1964(a) (Equity) and section (c) (Right to Sue and Treble Damages) (Civil Rico). e.g., the Organized Crime and Control Act of 1970, Pub. L. No. 91-452, Section 901(a), 84 Stat. 941, Racketeering Influenced and Corrupt Organizations, (hereinafter referred to as RICO), and Title 28, United States Code, Sections 1331 & 1343 and for violations of the Laws and Constitution of the Commonwealth of Puerto Rico under 31 L.P.R.A. Section 5141 (1990). The Verified Complaint was accompanied with an Appendix, containing seventeen (17) Exhibits. See Appellant's Appendix, (hereinafter referred to as AA) pgs. 618-699. Included in the Appendix to Complaint were five (5) sworn affidavits, four (4) of whom were previous PRIC Executive Directors and top employees. See AA pgs. 644-651, 662-667, 668-682. (Plaintiff's Appendix to Complaint, Exhibits 1, 6, 7 and 9). The facts alleged in the Verified Complaint and supported by these sworn declarations raise issues of fraud as there was no authority by codefendants to deny plaintiff his rights and petition. The exhibits also contain admission by codefendants PRIC and CRIM whom are estopped from asserting any different position in this case. These include, but are not limited to: the PRIC endorsement and seal of the Project. See AA at pgs. 652-653.

The claims in the complaint arise from a common nucleus of operative facts resulting in the predicate acts and violations of RICO by the connection with a scheme devised, conduct and/or participated by codefendants, each of whom are

employed by and are associated with defendant Puerto Rico Institute of Culture (hereinafter referred to as PRIC) and CRIM to conduct and participate, directly or indirectly, through a pattern of racketeering activity, and to conspire to do so, and to willfully and unlawfully to defraud appellant/plaintiff's assets and conspire to do so, all to the detriment of appellant/plaintiff's civil rights. The predicate acts are violations of Puerto Rico law constituting criminal behavior for public officials to forge, destroy and/or alter public documents and by the use of mail and wire.

On or around October 2000, Appellant/plaintiff Dr. Lugo Rodriguez, through conversations with the PRIC's prior Executive Director, Dr. Luis E. Diaz Hernandez, discovered for the first time that he had never denied appellant/plaintiff the tax exemption nor did he have any knowledge of the demolition required by defendant on PRIC's previous endorsements. In addition, Dr. Hernandez did not have any knowledge of the PRIC's fraudulent letters, bearing his name, allegedly written and signed by codefendants Architect Jorge Ortiz Colon, on behalf of PRIC, to appellant/plaintiff Dr. Lugo Rodriguez, regarding said endorsement and demolition requirements. See AA pgs. 644-651.

This genuine issue of material fact, never litigated before, was heavily disputed by the parties should of prevented the district court from granting defendant's summary judgment. Appellant/plaintiff's sworn statement in their appendix from the PRIC's Executive Director during the times the cause of action arose was not rebutted by defendants and raised this material fact to be decided by a jury.

Appellant/plaintiff also alleged that codefendants PRIC, CRIM and individual codefendants conspired with each other in RICO scheme and defrauded appellant/plaintiff in violation of Puerto Rico laws by public officials constituting criminal conduct and by using mail and wire service fraud, thus, violated appellant/plaintiff's civil rights. See AA pgs. 618-628.

The complaint also alleges appellant/plaintiff had a ten (10) year tax exemption for Hotel Oasis that was issued bu

the Puerto Rico Tourism Company in case No. 81-26-1-1. Said tax exemption was valid for fifteen years until 1998 and for every year from 1983-1998, no taxes were assessed by CRIM. After applying for another tax exemption renewal, CRIM, without any notice, arbitrarily and capriciously, through codefendants, retroactively reassessed the Hotel Oasis's tax assessment back to 1977 with interests and late fees in violation of law and appellant/plaintiff's property rights.

Contrary to defendant CRIM's representation to the District Court that the case was final and there was a hearing, that case went to the Supreme Court of Puerto Rico who ordered that the case be filed in the Court of First Instance where it is pending on this date after being submitted. See Addendum to Brief, pgs. 32-33.

While in administrative review, codefendants Manuel Velazquez and Osvaldo Gonzalez Aviles attempted to extort and bribe appellant/plaintiff concerning payoffs for a reduction in tax assessment which appellant/plaintiff refused. CRIM applied Ex-Post Facto laws to appellant/plaintiff and denied him due process rights and a hearing during administrative proceedings despite setting hearing dates that were never held. See AA pgs. 628-633.

On that same day the complaint was filed, codefendant CRIM, by attorney Aixa Rey-Diaz, filed it's Notice of Appearance, with numerous Spanish language documents at the filing of the complaint, as notice was given by appellant/plaintiffs attorney of the Motion for a Temporary Restraining Order (TRO) and Preliminary Injunction. See Docket No. 3. This fact is admitted to by codefendant CRIM and is undisputed.

On October 3, 2001, the District Court denied appellant/plaintiff's TRO request and, *sua sponte*, ordered appellant/plaintiff's to shown cause why the complaint should not be dismissed against CRIM for lack of subject matter jurisdiction. See AA pgs. 609-610.

On October 11, 2001, after requesting a short extension, appellant/plaintiff-appellant filed it's Reply to the Court's OSC, with a sworn statement and exhibits. Thereafter, the Court did not decide the motion. See AA pgs. 568-402.

On November 1, 2001, defendant CRIM filed an answer to the complaint and a motion to dismiss the complaint. See AA pgs. 556-562, 542-554. The basis of the motion was that allegedly appellant/plaintiff had sued CRIM in state court for the same reasons and that the case was dismissed and final and that CRIM had denied them the same relief administratively.

On November 13, 2001, appellant/plaintiff filed three motions, one to strike defendant's submission of Spanish language documents without any motions or pleadings in violation of Local Rule 108, a motion for service of pleadings and a motion for short extension of time to reply. See AA pgs. 536-537, 538-539, and 540-541.

On November 16, 2001, defendant CRIM filed it's oppositions to appellant/plaintiff's motions and admitted that they had filed Spanish language documents on October 2, 2001. They also allege that they cured any defect by subsequently submitting the English translation, with some other documents, in their motion to dismiss. See AA pgs. 532-535. The Court eventually denied appellant/plaintiff's motion to strike on May 9, 2002. See AA pgs. 182-183.

On December 18, 2002, defendant PRIC requested it's second extension of time to answer or plead, having first appeared on October 24, 2002 and requested the same. See AA pgs. 563-565, 513-514. Both requests were granted by the court. See AA p. 182. See Docket No.'s 28, 31.

On February 1, 2002, defendants PRIC filed their motion to dismiss and/for summary judgment. See AA pgs. 377-499 and filed their Statement of Material Facts in the Spanish Language. See AA pgs. 400-499. They also requesting two extensions of time to file the same in English. See AA pgs. 375-376.

On April 1, 2002, defendant PRIC submitted translation of their exhibits to Statement of Materials Facts. See AA 286-373. On that same date, defendant Fed. Insur. Co. moved to join motion to dismiss. See AA pgs. 283-285.

On May 2, 2002, appellant/plaintiff's filed it's Instanter Motion and Opposition to PRIC's Motion to Dismiss and/for Summary Judgment, with a separate Counter Statement of Materials Facts. See AA pgs. 281-282, 243-268, 269-280. These filings by appellant/plaintiff complied with Local Rules and is contrary to the Court's clearly erroneous findings that the same were not filed and codefendant PRIC's misstatement of the same.

On May 7, 2002, defendant PRIC sought leave to file reply. See AA pgs. 241-242.

On May 8, 2002, codefendant Fed. Insur. Co., (hereinafter referred to as FIC), filed it's Motion for Summary Judgment, Statement of Material Facts and Memorandum. See AA pgs. 184-217, 218-229, 240-242.

On May 13, 2002, appellant/plaintiff's filed their opposition to defendant PRIC's motion for leave to file reply. See AA pgs. 179-181.

On May 16, 2002, defendant Osvaldo Gonzalez-Aviles filed it's Motion to Dismiss, See AA pgs. 176-177 and appellant/plaintiff filed it's Opposition on June 6, 2002. See AA pgs. 167-168.

On May 28, 2002, defendant Manuel Velazquez filed an Answer to the Complaint. See AA pgs. 169-175.

On May 15, 2002, the Court granted defendant's PRIC Motion for Leave to File Reply to plaintiff's opposition against their Motion to Dismiss and/for Summary Judgment. See AA p. 178. Appellant raises the District Court's permitting numerous filings by defendant PRIC as an abuse of discretion and error.

On June 14, 2002, defendant PRIC filed another Motion Requesting fast and Brief Extension of Time. See AA pgs. 165-166.

On June 18, 2002, defendant PRIC filed it's Response to plaintiffs Counter Statement of Material Facts and Reply to Plaintiff's Opposition to the Institute's Motion to Dismiss and for Summary Judgment. See AA pgs. 152-164, 142-151.

On June 18, 2002, defendants filed four (4) motions to join motion to dismiss, included was the Puerto Rico State Court dismissal of the Mayaguez case; to withdraw as counsel, to join answer to complaint and leave to file Spanish language exhibits. See AA pgs. 136-141. Appellant's cite to the Motion to Join Motion to Dismiss and defendant PRIC's Motion to Dismiss, where both attorneys misled the district court, arguing res judicata, when that Mayaguez case was *not* final and unappealable. The arguments of res judicata in a case that is not final and unappealable is without merit as that is the first of a three prong test. These material misrepresentations by defendant's attorneys that the district court relied on were in violation of Rule 11 and constituted reversible error and is raised on appeal by appellant. (emphasis ours).

In fact, the Mayaguez case to this very date, is still proceedings in Puerto Rico State Court contrary to defendant's attorney Jose Santiago and Elisa Bobonis Lang representations to the district court. See Order, dated June 25, 2003, by the Supreme Court of Puerto Rico at Appellant's Addendum, at pgs. 30-31.

On June 25, 2002, plaintiff's filed their Motion for Leave to File Reply. See AA pgs. 121-122. On that same date, plaintiff's filed Instanter Motion Submitting English Language Exhibits. See AA pgs. 13-120.

On July 8, 2002, defendant PRIC filed their untimely Supplemental Reply to Plaintiff's opposition to the Institute's Motion to Dismiss and for Summary Judgment and a Motion to File Documents in Spanish. See AA 105-110, 103-104. The Court abused it's discretion in affording defendant PRIC

several attempts to file sur-replys to their own motions to cure defects and to rehash legal arguments when it denied plaintiffs the same relief. This one-sided did not allow for a fair level playing field three to one (3)-(1) in the case at bar.

On July 8, 2002, plaintiff's filed their Omnibus Opposition to defendant's motions as the motion to join answer attempted to amend earlier answers without leave of court in the proper manner. See AA pgs. 98-102.

On July 9, 2002, the District Court denied plaintiffs motion to file reply. AA at p. 97.

On July 16, 2002, defendant PRIC filed their opposition to defendant's FIC's Motion for Summary Judgment and Additional Uncontested Facts to Those Included in FCI Statement of Uncontested facts. See AA pgs. 74-94.

On July 21, 2002, defendant FIC filed it's Motion for Leave to File reply. See AA pgs. 72-73.

On July 22, 2002, plaintiffs filed four (4) motions for leave to file reply to FIC motion; motion to join PRIC opposition to FIC motion; motion for leave to file reply to sur-reply to PRIC; motion to strike said sur-reply as untimely. See AA pgs. 56-71.

On August 2, 2002, the Court denied leave to file reply to defendant PRIC. See AA p. 55.

Once again, on August 5, 2002, defendant untimely filed a Motion Requesting Leave to File response to Motions Filed by Plaintiffs. In said Motion for leave, defendant argues their points of law in an attempt to circumvent the Local Rules. See AA pgs. 52-54.

On August 13, 2002, the District Court issued it's Opinion and Order, granting defendant's motion to dismiss. See AA pgs. 27-51. Within said Opinion and Order, the Court made a mistake in fact that the Mayaguez and CRIM state cases were dismissed and final. The Court also erred when it stated that the fraud issues were litigated in a state case years before plaintiff even found out about the fraudulent letters by ex-

Executive Director, Dr. Luis Hernandez. On the same day, it issued a Judgment and ordered plaintiff to show cause by August 23, 2002 why it should not dismiss the remaining codefendants. See AA p. 24. On August 23, 2002, plaintiff filed a Motion to extend Time to Reply to OSC. See AA pgs. 17-19. On August 26, 2002, before the extended time requested expired, the Court dismissed the remaining defendant without waiting for plaintiff's Reply. See AA pgs. 23-24

On August 13, and August 28, 2002 the District Court entered Judgments, dismissing plaintiff's federal claims after granting defendant's Motions to Dismiss and for Summary Judgment. See AA pgs. 23, 25. On August 29, 2002, appellant/plaintiff filed a Motion for Reconsideration, Reply to Order to Show Cause and Motion for Leave to File Amended Complaint. Nunc Pro Tunc. See AA pgs. 04-22.

On September 12, 2002, appellant/plaintiffs filed its timely Notice of Appeal. See AA pgs. 02-03. This Circuit Court held in abeyance the Notice of Appeal until the district court decided and appellant/plaintiff's motion for reconsideration. See Docket No. 124. On October 24, 2002, the Court granted defendant Orlando Hernandez Motion to Amend Judgment. See AA p. 01. On March 14, 2003, the district court denied appellant/plaintiff's motion for reconsideration. See Docket No. 131.

On September 12, 2002 petitioner timely filed his Notice of Appeal. The First Circuit affirmed on May 5, 2004. App., 2-12 *infra*,

WHY THE PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED

QUESTION I

I. WHETHER THE COURT ERRED WHEN IT ALLOWED THE RES JUDICATA DEFENSE

1. *STANDARD OF REVIEW*

Whether plaintiff have stated a claim for which relief may be granted under Federal Rules of Civil Procedure Rule 12(b)

and whether motions for summary judgment should be granted are a question of law which the Appeals Court reviews de novo. *Judge v. City of Lowell*, 160 F.3d 67, 72 (1st Cir. 1998); *LaChapelle v. Bershire Life Insur. Co*, 142 F.3d 507, 508 (1st Cir. 1998).

2. *STANDARDS TO BE APPLIED*

I. MOTION TO DISMISS

The standard for a motion to dismiss made pursuant to the federal Rules of Civil Procedure, Rule 12(b) for "failure to state a claim upon which relief can be granted" the Court must begin by assessing "(w)e begin by accepting all well-pleaded facts as true, and we draw all reasonable inferences in favor of the non-movant)". *Leblanc v. Great American Ins. Co.*, 6 F.3d 836, 841 (1st Cir. 1995); *Washington Legal Foundation v. Massachusetts Bar Foundation*, 993 F.2d 962, 971 (1st Cir. 1993).

II. MOTION FOR SUMMARY JUDGMENT

Summary Judgment is appropriate if "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." *See* Fed. R. Civ. P. Rule 56(c). The Court reviews the record in the light most favorable to the non-movant and draws all reasonable inferences in favor of the non-movant)". *Leblanc v. Great American Ins.* Co., at 841.

The party moving for summary judgment bears the initial responsibility of demonstrating the absence of genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the moving party has satisfied this requirement, the nonmoving party has the burden of presenting facts that demonstrate a genuine isse for trial. *Leblanc v. Great American Ins.* Co., at 841. The nonmovant must do more than show "some metaphysical doubt as to material facts". *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). An issue is genuine when, based on the evidence, a reasonable jury could return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

III. STANDARD TO BE APPLIED IS THE LAW OF THE STATE

There is no contention that the United States District Court for the District of Puerto Rico must give full faith and credit to the judgments of the courts of the Commonwealth of Puerto Rico. 28 U.S.C. section 1738 (1982). Section 1738 requires the federal courts to give the same preclusive effect to state court judgments that these judgments would be given in the courts of the State from which the judgments emerged. *Kremer v. Chemical Construction Corp.*, 456 U.S. 466 (1982). Appellant/ plaintiff's 42 U.S.C. Section 1983, 1986 Civil Rights Act and Civil Rico claims are both applicable to 28 U.S.C. section 1738 application.

IV. PUERTO RICO LAW ON RES JUDICATA-GENERAL RULE

The reviewing appellate court needed to look to the Puerto Rico Law to determine if the District Court committed error when it held that the prior state case constituted res judicata. *Rodriguez v. Baldrich*, 628 F.2d 691, 693 (1st Cir. 1980).

The pertinent Puerto Rico statute is Article 1204 of the Civil Code, 31 L.P.R.A. section 3343 that requires "the most perfect identity between the things, causes and persons of the litigants, and their capacity as such" *See Pagan Hernandez v. Universidad de Puerto Rico*, 107 P.R.R. 795, 806; 107 D.P.R. 720, 731-732 (1978); *Bolker v. Superior Court Sosa. Int.*, 82 P.R.R. 785, 792 (1961); *Futura Dev. Corp. v. Centrex Corp.*, 761 F.2d 33, 42-45 (1st Cir. 1985).

More importantly, under Puerto Rico law, claim preclusion requires a prior judgment on the merits that in the authoritative Spanish, "final y firme", which officially translated as "final and unappealable". This phrase makes manifest that Commonwealth court judgment cannot be accorded preclusive effect until all available appeals have been exhausted or the time for taking them have expired. *Cruz v. Medina*, 202 F.3d 14 (1st Cir. 2000).

The District Court made several factual determinations that were in error that supported it's determination. First of all, the District Court reviewed exclusively a state court proceeding that challenged the granting and then denial of a tax-exemption of the Project.

The Court committed error when referring to a Mayaguez state case pending that "On March 12, 2002, the Mayaguez Court of First Instance granted defendant's motion for summary judgment on res judicata grounds and entered judgment against the plaintiff's action with prejudice. See AA at p. 33. This fact and res judicata argument was promoted and plead by defendant PRIC attorney Bobonis Lang (AA p. 413) and Department of Justice Attorney Jose Cintron (AA pgs. 123-135) when both of them knew that the decision was not final, and the case was still pending as the time periods had not run. This fact was in error as the Mayaguez case is pending to this very date and appellant notified the Court of it's continuing proceedings. See AA at p. 20. To date, that case is not final and unappealable as it is in the Supreme Court of Puerto Rico. See Addendum to Brief, pgs. 30-31.

The District Court also committed error in it's factual determinations when it held that all of defendant PRIC and FIC statement of uncontested material facts were deemed admitted as "plaintiffs, however, have failed to comply with the so-called "anti-ferret rule" as they have not presented a concise statement of material facts as to which there is a genuine issue to be tried" See AA at p. 36 and 37.

Petitioner filed it's Opposition to defendant PRIC's Motion to Dismiss and For Summary Judgment with a separate, concise statement of Uncontested Facts. See AA 243-268-opposition and p. 269-280 Counter Statement. Thus, the Court was in error and appellant did comply with the Local Rule 311.11 requirements.

The District Court also committed error when it decided that "It is evident, from the Puerto Rico Circuit Court of Appeals decision, that the cause, facts and claims upon which the plaintiffs based their complaint in the State court are, in

fact, the same as the cause and claims stated in the case before this Court" See AA at p. 40. The Court erred further when it stated

> the sworn statements on which plaintiff's allegations rely contain numerous suppositions and statement's regarding PRIC's endorsements of the Project. The subject matter of these statements have been previously presented in the State Court action. The Puerto Rico Court of Appeals action decided the issue for PRIC's alleged fraud concerning Lugo's tax exemption request. Lugo could have submitted the sworn statement's attached to this complaint during the initial administrative proceeding if he had adequately prepared for the same. Plaintiff had the opportunity to fully litigate their claims both at the administrative level and before the Puerto Rico Court of Appeals on the fraud allegations presently before this Court. They cannot now pretend to relitigate these issues and have a second bite at the apple.

See AA pgs. 17-18.

This Honorable Court should take notice that the Appeals and District Court sole reliance in their summary judgment motion was on a State Appellate Court decision of an appeal from an informal administrative PRIC hearing. While the appellant did seek the tax exemption for the Project, the cause and thing of the case at bar is very different in that it requested that the Court award damages for the conspiracy and fraudulent acts and omissions of defendants that violated appellant's civil rights. In contrast to this case to the administrative informal process, there with no administrative law judge, no rules of evidence, no discovery, no adequate recording of petitioner's expert witness, as it was inaudible for transcribing for review. PRIC did no even have the originals plans of the Project at the informal hearing as they were "lost" by defendant Doris Masa.

Moreover, the PRIC decision was self-serving and controlled by the very legal department head, defendant Robert Bounds, and while involving some actors and defendants, did not involve other codefendants, agencies and causes of action, relief and rights. It was limited to the tax-exemption denial, where no allegations, findings and or issues of fraud raised. The Court's reasoning that the sworn affidavits submitted in petitioner's Appendix to Complaint could of been produced at the administrative process is impossible as they were first written in the year 2000, when appellant first learned of the Dr. Hernandez fraudulent letter and other schemes by defendants.

The issue of fraud or it's subject matter was not raised on appeal as the review was limited. There was no jurisdiction of the Appeals Court to hear any allegation of fraud as it was not an issued raised in the administrative proceedings. There was no concurrent subject matter jurisdiction of the Court to hear or to raise any federal claims, claims for damages and/or injunctive relief. There were clearly no issues of fraud raised, as petitioner first found out about the fraudulent letter of Executive Director Dr, Hernandez in fall 2000, some years later. See AA at pgs. 644-648. It is impossible to litigate an issue of fraud that appellant had no knowledge and/or information about at the time the administrative proceedings were being held. The PRIC letter by Dr. Hernandez, allegedly signed, and received by mail and fax, was given the weight by the official examiner, as well as the Board. and defendants testified to as authenticity at the hearing by codefendant Davila-Colon and Mildred Gonzalez. Accordingly, the District Court's determinations on these facts were clearly erroroneous as no issue of fraud was ever presented, rather some irregularities, that did not constitute the same elements of the cause of action of section 1983 or RICO in the case at bar.

While the District Court held that the thing and cause were the same, the issue of fraud is an exception to the general rule that will be addressed.

V. *EXCEPTIONS TO THE GENERAL RULE*

The Supreme Court of Puerto Rico has for a long time acknowledged several exceptions to the application of res judicata. In *Figueroa v. Muncipality of San Juan*, 98 P.R.R. 523, 545 (1970), it recognized that the presumption of res judicata has well-defined exceptions at law of an equitable order. *Pagan Hernandez v. Universidad de Puerto Rico*, 107 P.R.R. 795, 806; *Millan v. Caribe Morn Corp.*, 83 P.R.R. 474, 485-489 (1961); *Perez v. Bauza.* 83 P.R.R. 213, 217-218 (1961); *Suarez Fuentes v. Superior Court*, 88 P.R.R. 133, 148 (1963); *Marcano Arroyo, v. Kmart Inc.*, 81 F. Supp. 2d 301, 308 n. 17 (D.P.R. 1999).

Res judicata is a judge-made doctrine based upon policy considerations, and it is appropriate to take into account equitable concerns. *Diversified Foods Inc., v. First Nat'l Bank of Boston*, 985 F.2d 27, 31 (1st Cir. 1993). The First Circuit Court of Appeals has recognized and held that under Puerto Rico law, "res judicata should not be applied inflexibly if doing so would run counter to the ends of justice when public policy concerns are present". *Baez Cruz v. Municipality of Comerio*, 140 F.3d 24, 28 (1st. Cir. 1998).

Among these exceptions are those cases which are permeated by consideration of public policy, which include a previous judgment (which was null) based upon an acceptance of a claim which was null, *Vidal v. Mongas*, 66 P.R.R. 588, 599 (1946); a previous judgment entered without jurisdiction, *Tartak v. District Court and Cruz, Int.*, 74 P.R.R. 805, 812 (1953); a Superior Court judgment whose review was sought but not attained because of reasons not within the applicant's powers, *Riera v. Piza*, 85 P.R.R. 256, 267 et seq (1962); the ends of justice were defeated *Feliciano Ruiz v. Alfonso Develop. Corp.*, 96 P.R.R. 105, 110 (1968).

VII. *FRAUD AS AN EXCEPTION*

The other exception to the res judicata rule, as in the case at bar, is where there is fraud, *Suarez Feliciano v. Superior Court*, 88 P.R.R. 133, 148 (1963); *Bolker v. Superior Court*, 82 P.R.R. 785, 792 (1981); *Aybar v. Vara*, 51 P.R.R. 182, 184-186 (1937). *See also,*

Aponte Cratini v. Roman Torres, 98 TSPR 53,(1998) (res judicata is a valid defense as long as judgment was entered by a court exercising proper jurisdiction in the absence of fraud. *Sosa Int.*, at 82 P.R.R. 785, 792 (1961), *Aybar v. Vara*, 51 P.R.R. 182, 184-186 (1937). Accordingly, an exception to the res judicata doctrine maybe appropriate in order to allow a party to proceed on the merits. *Banco de la Vivienda v. Cario Ortiz*, 130 D.P.R. 730, 739 (1992). Therefore, the District Court committed error when it failed to applied the res judicata defense exception to the facts of our case.

VIII. *APPLICATION IN CIVIL RICO CASES*

In Civil RICO cases, the issue of fraud has been held as a bar to the res judicata and/or collateral estoppel defense which is consistent with the application herein. *See George v. United Ky. Bank, Inc.*, 753 F.2d 50 (6th Cir. 1980) (dismissal of RICO claim on issue preclusion was error when plaintiff denied opportunity to litigate fraud in a prior state court action); *Powell v. Anderson Bank & Trust Co.*, 640 F. Supp. 1568 (N.D. Ind. 1986) (no preclusive effect accorded to a prior judgment obtain through fraud).

There are several cases that also hold federal court's barring the res judicata and collateral estoppel defenses, even where fraud was alleged in the prior case. Differing burdens of proof between state fraud claims and civil RICO fraud allegations vary and may also bar issue preclusion.

Thus, in *Wilcox v. First Interstate Bank of Oregon*, 815 F.2d 522 (9th Cir. 1987), the Ninth Circuit held because civil RICO claims need to be proven only by perponderence of evidence, whereas common law fraud allegations had to be suppoorted by clear and convincing evidence, a jury's finding of no liability for common law fraud would not preclude bringing a civil Rico suit on the same facts.

By analogy, courts have failed to grant the preclusive effect in prior criminal cases. Determining which issues were actually decided in a prior litigation is a question of law for the court. *Emich Motors Corp., v. General Motors Corp.*, 340 U.S. 558, 571

(1951). Courts generally look to the record in the prior case, including the pleadings, the ev idence, jury instructions and judicial rulings. *See Ashe v. Swenson*, 397 U.S. 436 (1990). Unless the facts adjudicated in a prior criminal proceedings are clear, courts have tended to deny application of issue preclusion in related civil suits. *See Apply v. West*, 832 F.2d 1021 (7th Cir. 1987)(no preclusion in civil RICO case in amount of damages based on prior criminal conviction).

VIII. *THERE IS A PUBLIC POLICY CONSIDERATION EXCEPTION THAT WARRANTS BARRING RES JUDICATA DEFENSE*

It is abundantly illustrated in petitioners record, i.e., Verified Complaint, Appendix to Verified Complaint, and Counter-Statement of Contested Facts, that contain several allegations of fraud with documentary evidence, were not rebutted by defendant. It is exactly this type of case involving fraud that the Puerto Rico Supreme Courts jurisprudence, with strong public policy considerations, has long held to prevent an injustice where a judgment has been obtained through fraud.

As cited above, the Supreme Court of Puerto Rico has recognized several exceptions, including cases that are permeated by public order considerations. Two leading cases cited are *Perez v. Bauza, supra*, and *Millan v. Caribe Motors Corp., supra.*

In *Millan v. Caribe Motors Corp.*, the Supreme Court of Puerto Rico affirmed a Superior Court judgment allowing Petitioner to recover for damages in an action for recission of a conditional sales contract, albeit in a prior suit the vendor had repossessed the truck because of default in the payments. The Millan Court refused to apply res judicata because the vendee's consent had ben obtained by deceit, there were formal defects in the conditional sales contract in open violation of Puerto Rico Conditional Sales Act, and the initial suit (repossession) was a summary and special proceeding. *See Pagan Hernandez*, 107 D.P.R. at 737.

In *Perez v. Bauza*, a filiation suit brought four years after dismissal for want of prosecution, the Puerto Rico Supreme Court held that special circumstances warranted that, as an exception to the general rule. res judicata be inapplicable. In *Perez*, there were special public policy considerations of filiation.

In the case at bar, we have public officials in an administrative agency violating the public trust of it's citizens by a scheme and pattern of criminal behaviour that is ever present in our society today. Courts should not reward parties, especially public officials, who perpetrate fraud on the legal system with the protective veil of the res judicata or collateral estoppel defense. To do so, would be against public policy and send the wrong message to persons hiding behind agencies shield while committing acts of fraud and false documentation, which is a crime under the Criminal Code of Puerto Rico.

Therefore, the exception to the res judicata and collateral defense should of been applied in our case because of the public policy considerations stated herein in keeping the public trust and keeping the public accountability.

IX. *APPLICATION OF THE EXCEPTION TO THE FACTS*

The Court of Appeals committed error when it affirmed the Judgment of the District Court. The District Court committed reversable error when it reliance on a prior state court case is fatal as fraud is an exception tom the defense of res judicata. Accordingly, the Opinion and Order of the Court should be reversed applying Puerto Rico Law. While this argument is conclusive, appellant will further illustrate fraud found in the record in appellant's Counter Statement of Uncontested Facts.

The fraudulent documentation utilized by codefendants in the prior case is found in the record in Petitioners Appendix to Verified Complaint, for example Dr. Luis E. Diaz Hernandez's Sworn Declaration, dated January 29th, 2001. AA at pgs. 644-648.

In Dr. Diaz Hernandez's sworn statement there is sufficient evidence to find that there are numerous incidences of fraud involving at least three (3) different codefendants, Ortiz-Colon, Gonzalez-Valentin and Robert Bounds, that raise material issues of fact to defeat defendant's summary judgment motion. Additionally, the complaint and record does state a claim upon which relief can be granted to defeat defendant's motion to dismiss.

These material facts as to which there are genuine issues to be tried in the Hemandez Declaration states the following facts, that are also included in petitioners Statement of Material Facts filed separately: they are:

1) that he was the Director for the Puerto Rico Institute of Culture between the years of 1995 through 1997 and that Mr. William Marini was his assistant.

2) In reference to the final report in relation to the tax exemption that was drafted by Architect Mildred Gonzalez Valentin, dated November 4th, 1997, the declarant states that the July 7, 1997 Memorandum, purportedly drafted by him as the Executive Director and which bears the signature of Architect Jorge Ortiz Colon.

3) that it also surfaces from said Report and letter dated July 7, 1997, and addressed to Mr. Lionel Lugo Rodriguez, and unsigned but gives the impression that it had originated by him, that he had never seen either of these.

4) that these had not been part of his approval or signature.

5) that his assistant, Mr. William Marini does not have any knowledge about the same.

6) whereby the July 7, 1997 and letter are void, and should have never formed part of such report.

7) that the use given the Mildred Gonzalez Valentin final report was brought to his attention at the time of the declaration, whereby such false documentation was enclosed,

and prompted a denial of the tax exemption application in the above stated case.

8) and which, from it's inception, had been approved by the Puerto Rico Institute of Culture, and was subsequently subject of a judicial review procedure in which the basic document to be adjudicated upon composed by said report, and which to my understanding, was defective from its inception.

9) that the tax exemption letter request for Plaza Sur Oeste Building was within the files of PRIC and forwarded to him by mail and fax and for reasons about which he have neither known, nor about the apparent inconsistencies effectuated by PRIC officials,

10) that had he acquired knowledge about such inconsistencies, he would of investigated them.

11) that he relieved Jorge Ortiz Colon from his duties as the Built Historical Patrimony Director, effective the month of July of 1997 and that same date is when the non-authorized and voided documents surface.

12) that he never rejected any Tax Exemption for the Plaza Sur-Oeste Building.

13) that upon reviewing the documentation submitted herein and noticing at this time that they had the go ahead and endorsement from the PRIC for a 3-level building, that the project had been completed.

14) that he would of granted such tax exemptions retroactively for 10 years with renewal since such project had complied with all of the requirements from the Institute of Culture and other agencies therein.

15) that the current application is for a three level one which was approved and endorsed on September 15th of 1989 by Architect Ortiz Colon, after building plans had been reviewed, and which has the seal of approval om the PRIC, dated May 15th, of 1992.

16) that in the Gonzalez Valentin final report, she mistakenly classified said project as one for refurbishing, when same should of been for a restructuring.

17) Said project currently has approval from the PRIC and the Arpe Certification and also permits from all other agencies, whereby it is entitled to a retroactive exemption, and a 10 year renewal, since same was completed in full and was certified through approval by the PRIC since May 15, of 1992.

18) that the tunnel protection plan during said construction was subsequent to the PRIC's endorsement, since the endorsement of Architect Ortiz Colon on September 15th of 1989, specifically for the Plaza Sur Este Building, and it's blueprints, approved by ARPO.

In contrast, appellee/defendant in it's Motion to Dismiss mischaracterized petitioners allegation and documents in an attempt to explain and rectify an untenable legal position that was replete with fraud. The Hernandez Declaration stated sworn facts that were in direct opposite and contrasted with defendant's alleged facts as stated in their Statement of Material Facts as to which there is No Genuine Issues to Be Tried. See AA at p. 269-280.

For example, references to the codefendant Gonzalez-Valentin final report used the July 7, 1997 Ortiz Colon (fraudulent) letter, stating that based upon these observations and recommendations, the Institute denied the application for endorsement. The administrative hearing where Mildred Gonzalez testified also was used. In Nov. 4, 1997 the Final Report, by codefendant Gonzalez, it incorporated Dr. Diaz Hernandez's July 7, 1997 Memorandum in her decision to recommend five year exemption but stated that a signed copy had not been received. See AA p. 277.

Defendant Valentin testified and stated that the Board of Directors of the Institute adopted said report and denied the endorsement; mistakenly interpreted petitioners motion for consideration and attempted to promote the draft theory of the Hernandez July 7, 1997 Memorandum, referring to the draft

without any explanation that contradicts petitioners Hernandez Declaration.

Accordingly, the District Court's finding that petitioner could of raised this issue in the appellate review of an informal administrative hearing was incorrect as there was no jurisdiction to hear these claims raised herein. This is also an exception to the general rule of res judicata bar petitioners attorney relied on the fraud exception to rebut defendant's res judicata arguments.

Petitioner's complete record, Verified Complaint and Appendix also contained several other documents that involved sworn declarations that raised materials facts of fraud that needed to be presented to a jury. See AA p. 662-664 Luis Ruiz Quirindongo, advisor to PRIC Executive Director, Dr. Jose Ramon de La Torre, until January 31, 2001, stated "that it was evident that documents had been concealed, and possible crimes committed therein, which induced errors within the examiner's report, as well as the courts and officials of the Cultural Institute." See AA at 662-664. There are other references in the record, sworn declarations by all high ranking PRIC officials that supported appellant's contention of on-going fraud to date. See AA 668-671, PRIC's former Executive Director; Dr. Jose de la Torre Martinez, See 674-677 Edgar Correa Salagado, PRIC Press Director, that also illustrates the on-going fraud. The three previous PRIC"s Executive Director's sworn declarations were never rebutted by the Court and/or appellees and could not be wrong in assessing the veracity of petitioner's claims in the case at bar.

Appellant's requests for a tax exemption, even before the Project qualified, is clear from the record AA at p. 277-280, translated at AA p. 113-120 and is contrary to appellee's waiver argument.

The Court's reliance on the waiver and collateral argument were in error as the alleged RICO & 1983 were different set of facts and legal issues that were never litigated and different from the tax exemption sole issue.

More decisively, fraud is an exception that does bars the res judicata affirmative defense under abundant applicable authority under the Commonwealth of Puerto Rico Laws and jurisprudence cited herein.

The District Court erred when it disregarded petitioners contested facts and allowed the res judicata defense in a case that is procedurally and factually different.

X. PENDING STATE COURT CASES CAN NOT BE RES JUDICATA

Petitioner assert that the court's finding of fact that the Mayaguez Court granted defendant PRIC's motion for summary judgment on March 12, 2002 is clearly erroneous. The case is not final. *Cruz v. Medina*, 202 F.3d 14 (1st Cir. 2000). That case was scheduled for a October 7,2002 hearing after rescheduling the July 22, 2002 hearing See AA at p. 20. See Addendum to Brief at p. 30-31.

Likewise, the District Court reached the same wrong factual determination that the CRIM state court case, also raised by codefendant, had been dismissed and was final. See AA at p. 21-22. In order for res judicata to be a bar, all available appeals have to be exhausted or the time for taking them have expired. *Id.* Both PRIC and CRIM state court cases were not final, contrary to the mis representation to the Court by defendant's attorneys under Rule 11 certification, that were misleading and incorrect.

The District Court's reliance on those misrepresentations by these codefendants can not be given any res judicata effect on those pending state cases pursuant to applicable case law cited herein.

According, the claims against all individual codefendants, PRIC and CRIM should not of been dismissed based upon these grounds. Thus, the Judgment should be vacated and set aside for all of codefendants.

QUESTION II

I. WHETHER THE COURT ERRED WHEN IT FOUND THAT PETITIONER FAILED TO FILE CONTESTED FACTS IN OPPOSITION TO SUMMARY JUDGMENT AND DID NOT COMPLY WITH LOCAL RULE 311

The District Court erred when it found that petitioners had not complied with the requirements of Local Rule 311.11 and found all of defendants allegations were deemed admitted. See AA at p. 37. Appellant's opposed PRIC and Federal Insurances's Motion for Summary Judgment with a Counter Statement of Material Facts in compliance with Local Rule 311.11. See AA ai p. 269-280. The separate, concise statement of facts were supported with Sworn Affidavits and letters from PRIC that rebutted their waiver arguments and references were made to the record. These material contested facts were listed in petitioners contested issues of facts that was submitted to this Court on May 2, 2002.

Thus, petitioners Counter-Statement of Contested Facts did comply with Local Rule 311.11 and should of been afforded the same effect that was given to defendant's.

Petitioners initial Verified Complaint had attached to it an Appendix with seventeen (17) exhibits that had admissions from codefendants. See AA 618-699.

These exhibits had a prima facie effect of promissory estoppel against defendants from alleging disputed facts and a res judicata bar as petitioners had detrimentally relied on defendant's approval in their construction of their property.

Petitioners Counter-Statement of Contested Facts stated eighteen (18) contested facts: See AA at 269-280. It contained the following materials facts:

The fraudulent documentation utilized by codefendants in the prior case is found in the record in Petitioners Appendix to Verified Complaint, for example in Exhibit No. 1, Dr. Luis E. Diaz Hernandez's Sworn Declaration, dated January 29th, 2001. See AA at p. 264-268.

In Dr. Diaz Hernandez's sworn statement there was sufficient evidence to find that there were numerous incidences of fraud involving at least three (3) different codefendants that raise material issues of fact to defeat defendant's summary judgment motion. Additionally, the complaint and record did state a claim upon which relief can be granted to defeat defendant's motion to dismiss.

These material facts as to which there are genuine issues to be tried in the Hemandez Declaration stated the following facts, that are also included in petitioners Statement of Material Facts filed separately: they are:

1) that he was the Director for the Puerto Rico Institute of Culture between the years of 1995 through 1997 and that Mr. William Marini was his assistant.

2) In reference to the final report in relation to the tax exemption that was drafted by Architect Mildred Gonzalez Valentin, dated November 4th, 1997, the declarant states that the July 7, 1997 Memorandum, purportedly drafted by him as the Executive Director and which bears the signature of Architect Jorge Ortiz Colon.

3) that it also surfaces from said Report and letter dated July 7, 1997, and addressed to Mr. Lionel Lugo Rodriguez, and unsigned but gives the impression that it had originated by him, that he had never seen either of these.

4) that these had not been part of his approval or signature.

5) that his assistant, Mr. William Marini does not have any knowledge about the same.

6) whereby the July 7, 1997 and letter are void, and should have never formed part of such report.

7) that the use given the Mildred Gonzalez Valentin final report was brought to his attention at the time of the declaration, whereby such false documentation was enclosed, and prompted a denial of the tax exemption application in the above stated case.

8) and which, from it's inception, had been approved by the Puerto Rico Institute of Culture, and was subsequently subject of a judicial review procedure in which the basic document to be adjudicated upon composed by said report, and which to my understanding, was defective from its inception.

9) that the tax exemption letter request for Plaza Sur Oeste Building was within the files of PRIC and forwarded to him by mail and fax and for reasons about which he have neither known, nor about the apparent inconsistencies effectuated by PRIC officials.

10) that had he acquired knowledge about such inconsistencies, he would of investigated them.

11) that he relieved Jorge Ortiz Colon from his duties as the Built Historical Patrimony Director, effective the month of July of 1997 and that same date is when the non-authorized and voided documents surface.

12) that he never rejected any Tax Exemption for the Plaza Sur-Oeste Building.

13) that upon reviewing the documentation submitted herein and noticing at this time that they had the go ahead and endorsement from the PRIC for a 3-level building, that the project had been completed.

14) that he would of granted such tax exemptions retroactively for 10 years with renewal since such project had complied with all of the requirements from the Institute of Culture and other agencies therein.

15) that the current application is for a three level one which was approved and endorsed on September 15th of 1989 by Architect Ortiz Colon, after building plans had been reviewed, and which has the seal of approval of the PRIC, dated May 15th, of 1992.

16) that in the Gonzalez Valentin final report, she mistakenly classified said project as one for refurbishing, when same should of been for a restructuring.

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18) that the tunnel protection plan during said construction was subsequent to the PRIC's endorsement, since the endorsement of Architect Ortiz Colon on September 15th of 1989, specifically for the Plaza Sur Este Building, and it's blueprints, approved by ARPO.

In contrast, appellee/defendant in it's Motion to Dismiss mischaracterized petitioners allegation and documents in an attempt to explain and rectify an untenable legal position that is replete with fraud. The Hernandez Declaration stated sworn facts that were in direct opposite and contrast with defendant's alleged facts as stated in their Statement of Material Facts as to which there is No Genuine Issues to Be Tried.

Thus, the District Court erred when it found that appellant had not complied with Local Rule 311.11 and deemed as admitted all of defendant's materials facts alleged in their motions.

The Court of Appeals did not rule on this issue which was crucial to the District Court's decision that found that the Puerto Rico Court of Appeals had an opportunity to hear these claims which is contrary to case law and procedural challenges to an administrative findings under the laws of Puerto Rico.

QUESTION III

I. WHETHER THE APPEAL COURT ERRED WHEN THE DISTRICT COURT ERRED WHEN THE COURT SUA SPONTE MOVED TO DISMISS THE COMPLAINT FOR FAILURE TO STATE A CAUSE OF ACTION SHOULD OF AFFORDED APPELLANT/PLAINTIFF AN OPPORTUNITY TO AMEND THEIR PLEADINGS IN THE RICO AND SECTION 1983

Despite all of the pre-trial motion practice, no motion to dismiss was filed for failure to state a RICO cause of action. Rather, this Court sua sponte, raised the issue without giving petitioners an meaningful opportunity to respond by amending their complaint.

This Court in it's sound discretion and sense of fairness and justice should allow petitioners an opportunity to amend their pleadings as Civil RICO cases are complex and the pleadings requirements more specific.

Petitioners had requested a twenty (20) day period to file an amended complaint as "justice requires" pursuant to Fed. R. Civ. Proc., Rule 15(a) and the burden is usually on the party opposing the amendment to demonstrate why the amendment should not be permitted. *Firestone v Firestone*, 76 F.3rd 1205, 1209 (D.C. Cir 1996) (per curiam) (criticizing district court's "complete failure" to explain grounds for denying leave to amend).

Petitioner's requested their Motion for Reconsideration and Leave to File to Amend. See AA pgs. 4-21. The Court's finding the heightened pleading requirements were not met should not of ended the case at that point. There are Standing Orders in our District Court For Puerto Rico by Judges to avoid these heightened requirements that the Fed. Rules of Civil Proc. Rule 8 liberal pleading versus Rule 9(b), specific. The Supreme Court of the United States has held that federal courts cannot impose a greater degree of pleading particularity than required under Rule 8. *Leatherman v. Tarrant County*, 507 U.S. 163 (1993). This adherence should limit the the application of Rule 9(b) to

those aspects of a RICO claim sounding in fraud. *See Ray v. Karris*, 780 F.2d 636 (6th Cir. 1985) (remanded the case to allow repleading RICO claim, but it did not mandate or sanction the use of Federal Rules regarding the sufficiency of pleadings).

The District Court in it's sound discretion should of granted plaintiff's motion for leave to file an amended complaint. The denial of the motion constituted an abuse of discretion when compared that the Court allowed defendants numerous and multiple extensions of time and leave to file sur-reply.

The Court of Appeals in it's Order, also committed error when it improperly applied the wrong standard of review concerning the complaint, pleadings and exhibits. The Appeals Court analyized the pleadings applying the improper standard of review and not the standard under Rule 12 as discussed above in Question 1. The reviewing Court was premature in it's review of the pleadings, etc. and affirming the decision when the District Court did not review the pleadings and only dismissed the case on res judicata grounds and not on the sufficiency of the pleadings grounds used by the Appeals Court.

CONCLUSION

The Petition should be granted.

Respectfully submitted,

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